

Supreme Court, U. S.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. **78-103**

JIMMY H. SMITH,
Petitioner,

v.

GEORGE T. FORRESTER, d/b/a IDEAL HOME & DEVELOPMENT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals of Georgia

G. HUGHEL HARRISON
P. O. Box 88
Lawrenceville, Georgia 30246
Attorneys for Petitioners



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Petitioner, Jimmy H. Smith, respectfully prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Georgia dated April 19, 1978, denying Petitioner's Application for Writ of Certiorari to the Court of Appeals of the State of Georgia.

OPINION BELOW

The Opinion of the Court of Appeals of Georgia appears in the Addendum to this Petition.

JURISDICTION

The Decision of the Court of Appeals of Georgia was rendered on February 15, 1978. An Application to the Supreme Court of Georgia for a Writ of Certiorari was denied April 19, 1978.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Where Petitioner's Motion for New Trial was made and signed by the trial Court within the time specified under Georgia Law, the trial Court after once agreeing to perfect filing of the Motion then refused to do so with the result that the Motion could not be timely filed, does the conduct of the trial Court constitute arbitrary and capricious action violative of the Due Process Clause of the Fourteenth Amendment?

STATUTORY PROVISIONS INVOLVED

Time for Motion for New Trial, etc.; Ga. Laws 1965, pages 18 through 30; 1973, pages 159, 167 (Ga. Code Ann. § 70-301). Powers of Courts Enumerated (Ga. Code Ann. § 24-104(6). Service and filing of pleadings subsequent to the original complaint and other papers, (e) Filing with the Court Defined; Ga. Laws 1966, pages 609, 615; 1967, pages 226, 229 (Ga. Code Ann. § 81A-105(e).

(See Addendum to the Petition)

STATEMENT OF THE CASE

(In accordance with revised Rule 21(1) of the United States Supreme Court, the record is not included with this Petition. However, references are made to those pertinent parts of the record below in setting forth this Statement of the Case.)

This case originated with the filing by Respondent of his Complaint in the Superior Court of Jackson County, Georgia, under date of January 29, 1976. In a three count complaint, Respondent sought to recover the purchase price of a mobile home together with the rental value thereof or, alternatively, to recover the mobile home itself. The facts of the case are not pertinent to the subject matter of this Petition, and so will not be set forth herein.

Upon the trial of the case a verdict was returned in favor of Respondent and judgment was entered thereon under date of March 16, 1977. (Judgment, Superior Court of Jackson County). Together with principal, interest, and attorney's fees, the judgment totalled \$24,712.67.

Thereafter, a telephone conversation took place between Petitioner's counsel's secretary and the secretary to the trial judge, James L. Brooks. At that time a hearing on Motion for New Trial was scheduled, and Petitioner's counsel was instructed to send the motion to the judge's office. The judge's secretary expressly advised the office of Petitioner's counsel that the rule nisi included with the Motion would be signed and filed by the Court.

The Motion was signed by the Court under date of April 14, 1977, within the thirty day statutory limit for filing. On April 15, 1977, the deadline for filing of the Motion, the same was returned unfiled by the Court to Petitioner's counsel.

On April 18, 1977, Petitioner's counsel returned the Motion to the Court with the request that it be filed in as of April 14, 1977, the date on which the Court signed the Motion. (Letter to James L. Brooks, Judge, Jackson Superior Court, dated April 18, 1977). Under date of April 20, 1977, the Court again returned the original Motion unfiled to Petitioner's counsel denying that any communications had ever taken place between the respective offices concerning the filing of the Motion by the Court. (Letter to Mr. G. Hughel Harrison, Attorney at Law, dated April 20, 1977).

Thereafter, Petitioner brought a Motion to Order Filing of Motion for New Trial. Under date of May 23, 1977, the trial Court ordered the filing of the Motion for New Trial, nunc pro tunc, as of April 14, 1977. (Order, Judge James L. Brooks, Jackson Superior Court, dated June 13, 1977). The Motion for New Trial was heard and denied. (Order of Judge James L. Brooks, Jackson Superior Court, dated September 22, 1977).

Petitioner appealed the denial of the Motion for New Trial. The Court of Appeals of Georgia dismissed the appeal on the grounds that the Motion for New Trial had not been timely filed. An Application for a Writ of Certiorari to the Supreme Court of Georgia dated April 12, 1978, was denied April 19, 1978.

REASONS FOR GRANTING THE WRIT

Where a Motion for New Trial was Made and Signed by the Trial Court Within the Statutory Time Limit, and the Trial Court Having Once Agreed to Perfect the Filing of the Motion Then Refused to do so with the Result that the Motion could Not be Timely Filed, the Conduct of the Trial Court Constitutes Arbitrary and Capricious Action Violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Due Process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. *Hannah v. Larche*, 363 U.S. 420. The term Due Process of Law has been understood to mean law in the regular course of administration through Courts of justice according to those rules and forms which have been established for the protection of private rights. *Endicott-Johnson Corporation v. Smith*, 266 U.S. 291; *Brown v. New Jersey*, 175 U.S. 172.

As a general rule, it is considered that one hearing which furnishes a full and fair opportunity for the litigant to state his case satisfies the requirements of Due Process. *Western Life Indemnity Company v. Rupp*, 235 U.S. 261. Furthermore, it has been recognized that the right of appeal for review is not essential to due process, provided due process has been accorded to the Court of first instance. *District of Columbia v. Clawans*, 300 U.S. 617. There is no inherent right to a new trial. *M'Lanahan v. Universal Insurance Company*, 1 Pet (U.S.) 170.

However, where a party is by statute granted the right to apply for a new trial (as in the case sub judice, Ga. Code Ann. § 70-301 et seq.) or to make an appeal and that right is negated by an arbitrary or capricious exercise of judicial power, where

the judicial action is in clear contravention of fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights, due process is violated. See generally, *American Railway Express Company v. Kentucky*, 273 U.S. 269; *Corrigan v. Buckley*, 271 U.S. 323; *West v. Louisiana*, 194 U.S. 258.

The Georgia Civil Practice Act, following in substance the Federal Rules of civil procedure, provides the following method for filing pleadings and papers:

"The filing of pleadings and other papers with the court as required by these rules . . . shall be made by filing them with the clerk of the court, *except that the judge may permit the papers to be filed with him*, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk." Ga. Code Ann. § 81A-104(e). (emphasis added)

Under Georgia Law, the trial court is empowered to permit filing of papers with it. In the case at bar, the trial court had represented to Petitioner's counsel that it would file the subject Motion for New Trial. The court had exercised its discretion to allow filing of the papers with it. Petitioner relied upon the trial court's assurances that it would complete the filing. This Petitioner submits, under the circumstances, the failure or refusal of the trial court to file the Motion for New Trial as promised constituted an arbitrary and capricious exercise (or non-exercise) of judicial power such as is prohibited by the Due Process Clause of the Fourteenth Amendment.

The Court of Appeals of Georgia disposed of this argument with the following rejoinder:

"While that section (Ga. Code Ann. § 81A-105(e)) authorizes a judge to permit papers to be filed with him, it

does not require him to do so." (See Addendum to this Petition for the full opinion of the Court of Appeals).

The Court's statement serves only to beg the question. Where a judge or members of his staff have stated that the papers could be filed with the Court, should he not then be required to complete the filing; should he not then be required to do the thing that he, or members of his staff said would be done? It was not the Petitioner's neglect, but rather failure of the court to file the papers which precluded filing of the motion within the statutory time limit. The trial court's omission to file the Motion resulted in Petitioner being deprived of a statutory right: the right to move for a new trial. It is too convenient for the Court of Appeals to shift the onus back to Petitioner where the judiciary itself has been a party to the injustice; where the inaction of the trial court itself engineered the circumstances that conclude this case on a technicality rather than on the merits.

Georgia law provides that a court has the power, inter alia,

". . . To amend and control its processes and orders, so as to make them conformable to law and justice; and to amend its own records, so as to make them conform to the truth." Ga. Code Ann. § 24-104(6).

Included among these is the power to enter judgments and orders nunc pro tunc so as to perfect the record. *Moore v. Moore*, 229 Ga. 600 (1972).

"Every court has the inherent power—and it is the court's duty—to correct its own records to make them speak the truth." *Whittle v. Jones*, 198 Ga. 538; *Seay v. Treadwell*, 43 Ga. 564.

Pursuant to Petitioner's Motion to Order Filing of Motion for New Trial the trial court ordered the Motion for New Trial filed as of April 14, 1977. Under the authority quoted above,

Petitioner asserts that the Motion was properly filed, was properly before the court, and that the denial of the Motion should have been subject to appeal.

It has been stated that the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion. *Roller v. Holly*, 176 U.S. 398. Arbitrary action by the tribunal in the hearing of a cause or in its order violates due process. *Washington Ex Rel. Oregon Railway and Navigation Company v. Fairchild*, 224 U.S. 510. What is such arbitrary action depends upon the facts of the case. *Powell v. Alabama*, 287 U.S. 45.

Petitioner submits that the action of the trial court was arbitrary, capricious, unfair, and unreasonable; that the failure of the court to file the Motion served to extinguish Petitioner's right to move for a new trial; that thereby, through fault of the trial court, the case was concluded on a technicality rather than on the merits. Petitioner further submits that the facts of this case warrant a finding of arbitrary action violative of the due process clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be granted to review the decision of the Georgia Court of Appeals.

Respectfully submitted,

G. HUGHEL HARRISON
Post Office Box 88
Lawrenceville, Georgia 30246

I hereby certify that on this 18th day of July, 1978, three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mr. J. Nathan Deal, Greer, Deal, Birch, Orr and Jarrard, Attorneys at Law, Post Office Box 2522, Gainesville, Georgia 30501, Counsel for Respondent. I further certify that all parties required to be served have been served.

G. HUGHEL HARRISON
Attorney for Petitioner
Post Office Box 88
Lawrenceville, Georgia 30246
Phone 404-963-3421

APPENDIX

— A-1 —

The pertinent sections of the Georgia Code are as follows:

§ 24-104. Powers of Courts Enumerated. Every Court has power . . . 6. To amend and control its processes and orders, so as to make them conformable to law and justice; and to amend its own records, so as to make them conform to the truth.

§ 70-301. Time for Motion for New Trial, etc.;

All Applications for New Trial, except in extraordinary cases, shall be made within thirty days of the entry of the judgment on the verdict, or entry of the judgment where the case was tried without a jury . . .

§ 81A-105(e). Filing with the Court Defined.

The filing of pleadings and other papers with the court as required by these rules (this Title) shall be made by the filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Feb. 15, 1978

55139. Smith v. Forrester.

Shulman, Judge.

This appeal is brought from a judgment on a jury verdict in favor of appellee and from the denial of appellant's motion for new trial. Appellee has made a motion in this court to dismiss the appeal for failure to file a notice of appeal or motion for new trial within 30 days after entry of judgment.

Judgment was entered for appellee on March 16, 1977. On April 13, appellant's counsel sent a motion for new trial to the trial judge requesting the judge to sign the rule nisi attached to it and send a copy to opposing counsel. The judge complied with counsel's requests and sent the original of the motion back to counsel. Appellant's attorney immediately returned the motion to the judge, asking that it be filed of record as of the date it was signed by the judge and indicating that he believed his secretary and the judge's secretary had arranged to have it filed when signed. The judge again returned the motion, denying any knowledge of such arrangements and indicating that he did not file motions for new trial. By that time, the period in which the motion could be filed had passed. Counsel then made a formal "Motion to Order Filing of Motion for New Trial." That motion, opposed by appellee, was granted. Appellee argues that the trial court was without authority to order the late filing and we agree.

"All applications for new trial, except in extraordinary cases, shall be made within 30 days of the entry of the judgment on the verdict . . ." Code Ann. § 70-301. Appellant's contention is that by sending the motion to the judge for signature on the rule nisi he made application for new trial within the meaning of § 70-301.

"The defendant's appeal from [denial of his motion for new trial] and the appellee's motion to dismiss the appeal, raise this issue: can there be a valid appeal in the absence of the filing, within 30 days after entry of an appealable decision or judgment, of a notice of appeal, the obtaining of an extension of time therefor, or the filing of such motion as tolls the 30-day limit for appeal under the provisions of Code Ann. § 6-803 (Ga.L.1965, pp. 18, 21; 1966, pp. 493, 496; 1968, pp. 1072, 1077)? *Held:*

" 'The proper and timely filing of a notice of appeal is an absolute requirement to confer jurisdiction upon the appellate court.' *Jordan v. Caldwell*, 229 Ga. 343, 344 (191 SE2d 530) (1972). Code Ann. § 6-803 provides in part: 'A notice of appeal shall be filed within 30 days after entry of the appealable decision or judgment complained of . . ., but when a motion for new trial, . . ., or a motion for judgment notwithstanding the verdict *has been filed*, the notice shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.' (Emphasis supplied.) Motions for new trial and for judgment n.o.v. are required to be filed within 30 days after entry of the judgment on the verdict, or entry of the judgment where the case was tried without a jury (Code § 70-301 (as amended, Ga.L. 1973, pp. 159, 167), Code Ann. § 81A-150 (b) (Ga. L. 1966, pp. 609, 656; 1967, pp. 226, 237, 246, 248)), and 'no extension of time shall be granted for the filing of motions for new trial or for judgment notwithstanding the verdict.' Code Ann. § 6-804 (Ga.L. 1965, pp. 18, 21). Consistently, then the words 'has been filed' in § 6-803, *supra*, pertaining to a delaying motion, must mean filed within 30 days after entry of the judgment. To allow untimely filed motions, and thereby toll or delay the time for filing a notice of appeal, would violate the above quoted provisions of Code Ann. § 6-804, prohibiting extensions of time for filing such motions, as well as ignore the further mandate of § 6-804, that requires within 30 days either the filing of a notice of appeal or the obtaining of an

extension of time therefor. In this case, the appellant failed either to file a notice of appeal, or obtain an extension of time within the 30-day period. This makes the appeal subject to dismissal. *Model Cleaners & Laundry v. Per Corp.*, 127 Ga. App. 559 (194 SE2d 258) (1972), *Venable v. Block*, 141 Ga. App. 523, 524 (233 SE2d 373).

Code Ann § 70-301 was enacted as part of the Appellate Practice Act of 1965, "An Act to comprehensively and exhaustively revise, supersede, and modernize appellate and other post-trial procedure in civil and criminal cases. . . .," Ga.L. 1965, p. 18. Code Ann. §§ 6-803 and 6-804 were part of the same Act, and in view of the interplay of those statutes as set out in the quote above, we find a clear legislative intent that application for a new trial is made only by *filing* a motion for new trial. Motions are filed with the clerk of the court. Code Ann. § 81A-105 (e). While that section authorizes a judge to permit papers to be filed with him, it does not require that he do so. *English v. Atlanta Transit*, 134 Ga. App. 621 (2), 623 (215 SE2d 304). The record here shows that the trial judge did not permit the motion to be filed with him within the statutory 30-day period. Due to the statutory requirement of filing, we find untenable appellant's position that sending the motion to the judge constituted making application within the meaning of Code Ann. § 70-301.

The motion in this case was finally filed, pursuant to the trial court's order, on May 23, 1977, well after the expiration of the 30-day period for filing the motion. "Thus, when the 30-day period after the entry of the judgment on the verdict expired, no notice of appeal having been filed, no extension of time therefor obtained, nor a motion filed which would toll the time for the filing of the notice of appeal, the judgment, unappealed from within 30 days, became the law of the case, hence, the trial court was without jurisdiction to rule on . . . the motion for new

trial. . . . Accordingly, everything that occurred subsequent to the 30-day period after entry of the judgment on the verdict was a nullity, including the present appeal from the ruling on the void motions, . . ."

Venable v. Block, supra, at p. 525. Although in general we prefer that cases be determined on their merits, we reluctantly conclude that this appeal must be dismissed.

Appeal dismissed. Bell, C. J., and Birdsong, J., concur.